IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

SUIT NO. 372 OF 1981

AND

SUIT NO. 1415 OF 1980

Bhumiputra Commerce Bank ....Plaintiffs.
vs.
M/S. P.V.P. Products Ltd ....Defendants.

N.R. Mody i/by. Rustamji and Ginwala
for the plaintiffs.
Ms. Bindu and Panicker i/by. Ajay Panicker
for the defendants.
J.S. Saluja i.by. M.V. Kini and Co.
for Vijaya Bank.
A. Vishwanatha Iyer, Chief Manager of
Indian Overseas Bank.
For, Mumbai.

CORAM: S.U. KAMDAR, J.
DATE : 17TH MARCH,2006

JUDGMENT :

1. The present suit is filed for the recovery of sum of Rs.29,62,400/- with further interest at the rate of 18% p.a. from the date of the suit till the date of the decree and future interest at the rate of 18% p.a. till realisation. The suit arises on the following facts.

2. The defendant is a public Limited company in the name of M/s. Premier Vegetable Products Ltd. Sometime in/or about September/October 1977 the defendant approached the plaintiff bank known as M/s. Patel Holdings Sendirian Berhad, Penang (Malaysia) for the facility of negotiation of documents pertaining to one particular shipment proposed to be made through India. The said M/s. Patel Holdings Sendirian Berhad got the said shipment effected and drew a Bill of Exchange bearing no. 1610/77 dated 14-10-1977 from the defendant company. The said Bill of exchange was payable on its order 45 days from the sailing date of the vessel S.S. "Dong Moon" for sum of U.S. $ 255.968 equivalent to Rs.20,47,744/-. This amount was the C.I.F. cost of 399.950 metric tonnes of Malaysian refined bleached deodorised palm oil shipped to Bombay on the said vessel. Under the said bill of lading the cargo was consigned to the plaintiff and the defendant company was to be notified of the arrival of the said goods.

3. M/s. Patel Holdings Sendirian Berhad presented the said Bill of Exchange No. 1610 of 77 dated 14-10-19777 alongwith the original shipping documents including the Bill of Lading to the plaintiff bank. The said bill of exchange was thereafter negotiated and discounted by the plaintiff bank. in favour of M/s. Patel Holding. On the due date of the said bill of exchange the plaintiff sent the bill of exchange and the original shipping documents to the bank of Rajasthan which was acting as the collecting agents in order that the said bill of exchange may be presented to the defendant company for payment and the original shipping document to be released to the defendant company against the said payment. The said bill of exchange was presented to the defendant company on its due date through the bank of Rajasthan. In the mean time M/s. Patel Holdings Ld informed the defendant company of arrival of the goods of 299.950 metric tonnes of the Malaysian refined bleached deodorised palm oil. The said vessel S.S. "Dong Moon" arrived at Bombay and M/s. Eastern Steamship Ltd notified

the said arrival to the defendant company.

4. It is the case of the plaintiff that the defendant company took the delivery of the goods without producing the original shipping documents and the said original documents remained in the possession of the plaintiff bank. It is further case of the plaintiff that the said defendant company approached the shipping agency M/s. Eastern Steamship Ltd and representing themselves as the consignees of the said shipment requested the shipping agency to release the goods without the original Bill of Lading. It is his further case that the defendant company executed and lodged with the shipping agent a guarantee/indemenity bond purported to be counter-signed by the Bank of Rajasthan, and the same has been found to be forged document. The shipping agent released the entire quantity of 399.50 metric tonnes of Malaysian refined bleached deodorised palm, oil on the basis of the said forged documents and the defendant company took delivery thereof.

5. The Bank of Rajasthan Ltd as collecting agents of the plaintiff bank presented the said bill of exchange dated 14.10.1977 to the defendant company but the defendant company failed to make payment of the amount of U.S.$ 255,968 equivalent to Rs.20,47,744/-. The plaintiff bank thereafter through Bank of Rajasthan repeatedly requested the defendant company to make payment of the amount covered under the Bill of exchange but no payment was forthcoming. The defendant company thereafter by their letter dated 15.12.1978 addressed to the plaintiff bank admitted the liability to pay the amount covered under the said Bill of Exchange. The defendant company has also acknowledged their liability of the aforesaid amount in their books of Accounts. Thus according to the plaintiff the defendant company by taking delivery of the said 399.50 metric tonnes of Malaysian refined bleached deodorised palm oil through the shipping agents without producing the original shipping documents which are in the possession of the plaintiff bank have committed fraud. Ultimately the plaintiff

bank by their advocates letter dated 13.2.1980 called upon the defendant company to make payment of U.S. $ 255,968 equivalent to Rs.20,47,744/- with interest thereon at the rate of 16% p.a.. However the defendant company acknowledged the noticed on 6.3.1980 but denied their liability. Thereafter a further letter was sent on 24.3.1980 by the plaintiff bank for the recovery of the amount and informed the defendant company that they have filed a petition for winding up of the defendant company in the High court of Rajasthan where the registered office of the defendant company was situated. The said petition was pending as on the date of the filing of the suit and in the aforesaid circumstances the plaintiff has also filed the present suit for the recovery of claim of Rs.29,62,400/- with further interest at the rate of 18% p.a. thereon.

4. The defendants have filed written statement to the present suit. In the written statement it is contended that the claim is barred by the law of limitation. It has been further

contended that the plaint does not disclose any cause of action. The defendant has denied the liability to make payment under the said bill of exchange dated 14.10.1977. The entire written statement is of mere denial. In so far as the question of acknowledgment of liability is concerned in para 11 of the written statement it has been contended that the power of Attorney given to Mr. M.P. Jaju has been terminated by a resolution dated 4/9/1978 and therefore the letter dated 4.9.1978 is without authority and has no merits.

5. On the aforesaid pleadings issues were framed by the court on 7.10.1996 which read as under :

(1) Whether the defendant is bound and liable to pay to the plaintiff the amount claimed in the suit ?

(2) Whether the suit is barred by the law of limitation as alleged in para 1(a) of the written statement ?

(3) Whether the plaintiff negotiated documents and Bill of Exchange inrespect of shipment to the defendant of 399.50 mt

of Malaysian refined bleached deodorised palm
oil at the instance of Patel Holdings Sendirian Berhad as alleged in paras 5 to 7 of the plaint ?

(4) Whether Mr. M.P. Jaju's letter dated 15.12.19788 is not binding on defendant as alleged in para 11 of the written statement ?

(5) Whether the plaintiff has received the value of the goods from Patel Holdings Sendirian Berhad as alleged in para 5 of the written statement ?

(6) What reliefs ?

6. On 19.4.1985 i.e. subsequent to the filing of the suit a company Petition No. 3 of 1980 which was pending at the High court of Rajasthan, Jaipur was disposed off by passing an order that the defendant company shall on or before 31.7.1985 furnish a bank guarantee of a nationalised bank for sum of Rs. 10 lacs in favour of the Prothonotary and Senior Master, High Court, Bombay in the present suit which was pending. It has been further provided that the said bank guarantee shall be kept alive by the defendant company until the final disposal of the proceedings of the suit and shall also be

available to satisfy the said amount towards interest as may be decreed in favour of the plaintiff. In pursuance of the said order Vijaya Bank has given a bank guarantee no. 48 of 1998, The said bank guarantee interalia recites the order of Rajasthan High Court on page two thereof. Though the order directed for giving a bank guarantee for Rs. 10 lacs and also giving guarantee for the interest as may be decreed in favour of the plaintiff herein, the said bank guarantee was given only of Rs.10 lacs by providing that the liability of the said bank was restricted to Rs.10 lacs and nothing more. This bank guarantee was accepted by the Prothonotary and Senior Master if this court and has been renewed from time to time. However sometime in or about 7.4.1985 the plaintiff bank noticed that the said bank guarantee is not in consonance with the order passed by the Rajasthan High Court dated 19.4.1995 and pursuant thereof a letter was addressed to the Prothonotary and Senior master, High Court, Bombay by the previous solicitors requesting the Prothonotary to direct Vijaya Bank

to amend the bank guarantee so as to include the claim of interest. Pursuant thereof a letter was addressed by the office of the Prothonotary and Senior Master on 11.5.2005 to the Chief Manager Vijaya Bank inter-alia directing the bank to make the bank guarantee available to satisfy the said amount towards interest which may be decreed in favour of the plaintiff bank. Thereafter by their letter dated 31.5.2005 Vijaya Bank has amended the said bank guarantee and has inter-alia provided as under :

> 1. BG No.48/88 dated 26.8.1988 for Rs.10 lacs :
>
> Notwithstanding anything contained herein our liability in the BG shall not exceed Rs.10 lacs.
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> This clause is substituted with "Our liability in the above BG is for Rs.10 lacs and the same shall also be available to satisfy such amount of interest as may be decreed in favour of the plaintiff by the Hon'ble court in the above suit".

7. The said bank guarantee has expired on 31.8.2005. Learned counsel appearing for Vijaya Bank has contended that their liability is only upto Rs.10 lacs and nothing more.

8. Before I deal with the contention of the Vijaya Bank inrespect of the guarantee it is necessary for me to decide the main issues in the suit between the parties. The defendant who has been appearing and who was represented through his advocate M/s. Hiralal Thakkar and Co. has taken discharge and infact did not engage any other advocate to represent themselves in the matter. today the learned advocate appearing for the defendant seeks adjournment for seeking instructions from the clients. In view of the fact that the matter is already adjourned on number of occassions I decline to grant any such adjournment to the defendants.

9. Learned counsel for the plaintiff has tendered affidavit of evidence in chief of one Mr. Hemant Jassbhai Patel. The said affidavit of evidence is taken on record. Learned counsel for the plaintiff has also tendered compilation of xerox documents. He has also filed affidavit

dated 21.1.2006 for permitting the plaintiff to lead secondary evidence under section 63 read with 65 of the Evidence Act. In the said affidavit of secondary evidence it has been interalia pleaded that the original documents were with the Chief Manager, Indian Overseas Bank, Fort Branch and by letter dated 18.8.1988 the said Chief Manager was asked to produce the original documents. By a further letter dated 25.1.2006 once again Indian Overseas Bank was directed to produce the original documents but the same has not been produced. Pursuant to the earlier order the representative of Indian Overseas Bank, Fort Branch is present in court and states that the original documents are lost and not traceable. In that light of the matter the plaintiff is unable to produce the original Bill of Lading No. 1610 of 1977 dated 14.10.1977. In so far as the other documents are concerned which are mentioned at Item no.3 to 11 of the said affidavit it has been explained that the said documents are lost during the transfer of papers and proceedings which were in the custody of M/s. Hiralal Thakkar. The advocate has

shifted its office and in that process the papers are lost.

10. In the aforesaid circumstance I am satisfied that the plaintiff has made out a case for leading secondary evidence under Section 63 read with Section 65 of the Evidence Act. I have also perused the compilation of documents which has been tendered by the plaintiff and the affidavit of evidence of one Hemant Jasabhai Patel dated 22.1.2006. The defendant has not cross examined the plaintiff witness. Thus the evidence of the plaintiff witness Hemant Jasabhai Patel should be accepted as it is. The claim in the present suit arises out of a bill of exchange. A copy of the bill of exchange has been produced and there is no dispute that the defendant did not honour the said bill of exchange. Thus in my view the plaintiff has made out a case of passing of a decree on evidence produced before me. Accordingly there shall be decree in favour of the plaintiffs and against the defendants for sum of Rs.2,95,62,400/- with 12% p.a. simple interest on

the aforesaid amount.

11. Learned Advocate appearing for Vijaya Bank has however contended that Vijaya Bank is not liable to make any payment under the bank guarantee exceeding a sum of Rs.10 lacs. It is not dispute that the bank guarantee has been given pursuant to the order passed by the Supreme Court dated 2.9.1980 in Civil Appeal no. 1891 of 1980. The order of the Supreme court states that the bank guarantee has to be furnished in a sum of Rs.10 lacs and that bank guarantee also has to be kept alive for satisfaction of the interest claimed which may be decreed in favour of the plaintiff herein. Pursuant thereto a bank guarantee was given for a sum of Rs.10 lacs. However subsequently when it came to the notice of the plaintiff that bank guarantee is only for Rs.10 lacs and not for claim of interest they pointed out the same to the Prothonotary and Senior Master, High court who called upon the bank to alter the said guarantee to cover the claim of interest. The bank has thereafter by their letter

dated 31.5.2005 has unequivocally agreed to pay the claim of interest and has amended the said Bank Guarantee as under :

> "This clause is substituted with
>
> "Our liability in the above BG is for Rs.10 lacs and same shall also be available to satisfy such amount of interest as may be decreed in favour of theplaintiff by the Hon'ble Court in the above suit."

12. In my opinion once the bank having itself given a guarantee for sum of Rs.10 lacs which also specifically states that it is also available to satisfy such amount of interest as may be decreed in favour of the plaintiff in the present suit, then in that event the bank is bound and liable to honour the guarantee for sum of Rs.10 lacs with interest thereon as decreed in the present suit i.e. interest at the rate of 12% p.a. simple rate of interest from the date of the suit till payment and/or realisation. However learned counsel for Vijaya bank has contended that it is

not their liability to satisfy the claim of the plaintiff and that the guarantee is only for sum of Rs.10 lacs. He has further drawn my attention to the correspondence and particularly to the guarantee which was earlier given for sum of Rs.10 lacs. It has been contended that the sum of Rs.10 lacs under the said guarantee is only liability of the plaintiff bank and it has nothing to do with the claim of interest. It has been contended that not only the order passed by the Supreme Court was construed by the bank that it is for guarantee of Rs.10 lacs only but infact Prothonotary and Senior Master, High court, Bombay also construed the same accordingly and accepted the guarantee of Rs.10 lacs.

13. Firstly in my opinion the orders of the Supreme Court cannot be modified by virtue of a construction or interpretation by any of the parties and/or by the office of the Prothonotary and Senior Master. Secondly in the present case it is clear from the correspondence which has been

exchanged between the Prothonotary and bank being dated 11.5.2005 and the bank letter dated 31.5.2005 that it was an error on the part of the Prothonotary and Senior Master to accept the guarantee of Rs.10 lacs without inclusive of interest because the Supreme court order provided for giving the guarantee of Rs.10 lacs inclusive of interest. That fact was pointed out by the Prothonotary to the bank on 11,.5.2005 and infact the bank accepted the same on 31.5.2005 and modified the guarantee accordingly. It is only when the question came of renewing the guarantee further for a subsequent period after 2005 that the bank has now taken up a stand that they will only renew a guarantee for sum of Rs.10 lacs and not for any further amount. This contention raised by the bank that they will not renew the guarantee for amount of more than Rs.10 lacs cannot be accepted in the light of the order passed by the apex court. Learned counsel for the bank has thereafter contended that the order of the apex court is not binding on the bank and the same is binding only on the defendant. I am of

the view that the submissions made are without any merits and baseless. In my opinion once the bank has acted upon the said order and volunteered to give guarantee in accordance with the Supreme Court order than the bank is equally liable and bound to give the guarantee in consonance with the terms and conditions of the said order passed by the Supreme Court which specifically provides that the said guarantee will be of Rs.10 lacs plus interest amount which may be decreed by the court. In the light of the aforesaid I reject the contention of the learned counsel for Vijaya Bank and hold that the bank is liable to make payment of Rs.10 lacs as per the guarantee with further interest at the rate of 12% p.a. simple rate of interest from the date of the suit till payment as decreed by this court. Suit is accordingly decreed in favour of the plaintiffs and against the defendants for the sum of Rs.29,62,400/- with further interest at the rate of 12% simple rate of interest from the date of the suit till payment and/or realisation.

14. In so far as the Suit No. 1415 of 2000 is concerned the facts are identical and accordingly I also decree the said suit. In the said suit the claim is for sum of Rs.16,91,855.35/-. The said claim is decreed with further interest on the principal amount of Rs.3,65,000/- at the rate of 12% p.a. simple rate of interest from the date of the suit till payment and/or realisation. In this suit the guarantee given by the Oriental Bank of Commerce is for sum of Rs.17 lacs. There is no provision provided under the order pertaining to the claim of interest. Even the bank guarantee is only for Rs.17 lacs. The bank guarantee has been given by Oriental bank of commerce. The bank has not even substituted the bank guarantee clause by providing for interest as in the case of Vijaya Bank who has done so by letter dated 31.5.2005. In that light of the matter I am of the opinion that in Suit no. 1415 of 1980 the bank will be liable only to the extent of Rs.17 lacs including the claim of interest of the plaintiff in the second suit. The second suit is accordingly decreed for sum of Rs.16,91,855.35/- with further

interest ont he principal amount of Rs.3,65,000/- with 12% p.a. simple rate of interest from the date of the suit till payment and/or realisation. Both the suits are disposed off accordingly. No order as to costs.

sd/-

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